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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

WILLIAM ANDERSON,

Plaintiff and Appellant,

v.

MICKEY JEW, et al.,

Defendants and Respondents.

D053903

(Super. Ct. No. GIN058993)

APPEAL from a judgment and orders of the Superior Court of San Diego County,
Jacqueline M. Stern, Judge. Affirmed.

This appeal represents one chapter in an ongoing dispute arising from efforts by plaintiff and appellant William Anderson (Plaintiff or Anderson), since 2000, to air his concerns about the finances and management of the owner and operator of the mobile home park where he lives (Vista Pioneers I, Inc. (VPI), a nonprofit mutual benefit corporation). In March 2007, Plaintiff filed this legal malpractice complaint against his former attorneys who had represented him in an action challenging certain decisions by

VPI, these defendants and respondents, Mickey Jew and the law firm of Garrison & McInnis, LLP (Attorney Jew's former employer; sometimes collectively Defendants). Plaintiff claims that due to the actions and inactions of these defendants, he lost certain opportunities for redress in the action he was pursuing against VPI, *Anderson v. VPI* (Super. Ct., San Diego County, 2003, No. GIN033455) (the underlying action or *Anderson I*). Ultimately, that underlying action was dismissed without prejudice by another attorney for Plaintiff.

In this malpractice case, the trial court granted Defendants' motion for summary judgment on the only remaining cause of action in Plaintiff's second amended complaint ("current SAC"), which was premised on Defendants' allegedly negligent failure to prosecute (or its abandonment of) Plaintiff's underlying action against VPI. (Code Civ. Proc., § 437c.) Previously, Plaintiff's three other malpractice-related causes of action in this litigation were dismissed after demurrers were sustained without leave to amend. Following the summary judgment ruling, the court denied Plaintiff's new trial motion and his request for sanctions for Defendants' alleged presentation of certain false pleadings. (Code Civ. Proc., § 128.7.)

Plaintiff appeals all these related rulings, contending that the trial court made erroneous pleadings determinations and/or evidentiary rulings, and there are triable issues of material fact about whether Plaintiff sustained damages when Defendants failed to pursue or abandoned his underlying damages and attorney fees claims, particularly his theory of breach of fiduciary duty by VPI, in which he alleged it poorly managed the mobile home park and caused certain violations of his civil rights. (Civ. Code, § 52.1.)

Our first task is to review the state of the pleadings, in light of Plaintiff's arguments that the demurrers were incorrectly sustained. We will find no abuse of discretion in those orders, and have determined that Plaintiff's malpractice theories are fully presented by the remaining cause of action for abandonment of the underlying action. On de novo review, we next find that the trial court correctly determined Defendants were entitled to judgment as a matter of law, in the absence of any triable issues of material fact as to alleged malpractice that proximately caused harm to Plaintiff, through the loss of his breach of fiduciary theory against VPI. Even if the existence of duty and breach in transferring the file back to Plaintiff is assumed (for purposes of analysis), Defendants adequately showed that there were multiple legitimate reasons not to pursue their underlying action. Defendants' failure to file another amended pleading was not a causative factor of the failure and termination of the underlying action. Summary judgment was appropriately granted. Moreover, on this record, the trial court did not err or abuse its discretion in its rulings that denied the new trial and sanctions motions. The judgment of dismissal and related orders are affirmed.

FACTUAL AND PROCEDURAL BACKGROUND¹

A. Original Underlying Action; Previous Demurrers and Rulings

Since the current action seeks legal malpractice damages arising from the original underlying action, it is necessary to identify the roles of the various parties. To do so, we

¹ We have freely adapted the factual and procedural background from our prior unpublished opinion (*Anderson v. Vista Pioneers I, Inc.* (Dec. 16, 2008, D051517), the "successor" underlying action or "our prior opinion")). Portions of the discussion will be adapted as relevant.

will adapt portions of our prior opinion in a related action that Anderson filed, after the voluntary dismissal without prejudice of this original underlying action against VPI (*Anderson I*), that was accomplished by Plaintiff's replacement attorneys. In his successor action, Plaintiff pursued similar claims against VPI, but that successor action was ultimately dismissed after VPI's demurrers were sustained without leave to amend. Upon Plaintiff's appeal of that dismissal, we reviewed that set of successor allegations in our prior opinion.

Our resolution of that successor underlying action was to allow Anderson, upon remand, leave to amend a negligence cause of action against VPI, for a particular time frame (post-2004), while all other causes of action were dismissed after demurrer; however, this record does not reveal the status of that related proceeding on remand.

We now set forth the relevant background of the current legal malpractice dispute as adapted from our prior opinion.² Beginning in 1988, Plaintiff has lived at Vista Village Mobile Home Park (the Park), which is owned and operated by VPI. He became a member of VPI when he entered into his rental agreement with VPI (the residential agreement) and made an initial capital investment. Beginning in 1990, he began writing letters to VPI's board of directors expressing his concerns about the inaccuracy of VPI's financial statements. Anderson explains that in 1999 he also started to complain about

² We granted Plaintiff's unopposed request for judicial notice of certain documents lodged with the superior court file, by treating it as an augmentation of the record. (Evid. Code, §§ 452, 459.) We likewise granted Defendants' unopposed motion to augment the record with summary judgment moving papers and related rulings on demurrer and reconsideration.

the content of VPI's tax returns. According to Anderson, as a result of improper tax filings and improper designation of itself as a "stock cooperative," VPI lost \$103,000 in tax credits, paid tax that was not owed, and filed flawed tax returns for the years 1999 through 2005. In 2000, he started to utilize California's public agencies such as the Attorney General's Office, the district attorney's office and other relevant state regulatory agencies in an effort to monitor VPI's alleged misconduct.

In March 2001, VPI threatened to terminate his membership unless he signed a "Cease and Desist Stipulation" in which he would agree (1) to stop making complaints against VPI's accountants, and (2) to refrain from contacting the Attorney General, district attorney or other agencies about the actions of VPI's board in operating [the Park]. Anderson signed the Cease and Desist Stipulation but then informed VPI in July 2002 that he would no longer comply with it.

Many disputes continued at the Park between Plaintiff and others, and in October 2002, VPI's board suspended Plaintiff's membership for six months with conditions that he reimburse VPI in the amount of \$8,930 for its expenses and costs, and that during the suspension, he refrain from making complaints about the VPI board's actions. Anderson claims that as a result of the suspension, he was deprived of his right to vote in corporate elections, and a lien was placed on his membership in the amount of \$8,930. In September 2003, VPI allegedly informed Anderson that it would continue the membership suspension until he paid the \$8,930.

In October 2003, Plaintiff's then-attorney (Richard R. Leuthold) filed his original underlying action in the form of a petition for writ of mandate, to seek relief from the

suspension of his membership. (*Anderson I.*) Shortly thereafter, Plaintiff disagreed with his then-attorney's view of the case, and began to represent himself in propria persona, filing a first amended complaint (FAC) in June 2004. That FAC sought relief against VPI and other Defendants (its former board president John Larocque and its attorney David Semelsberger), to correct VPI's allegedly inaccurate tax filings and financial statements.³ Plaintiff alleged that VPI had illegally changed the legal status of the park, described as a residential real estate management association, into a stock cooperative or homeowner's association, and its management and accountants therefore filed the wrong tax forms, which led to adverse tax consequences (loss of a tax credit worth more than \$103,000).

Plaintiff then obtained new counsel, these Defendants, and they followed his wishes to file a second amended complaint (underlying SAC), adding a new defendant (another CPA retained by VPI, Mr. Griffiths, who eventually settled with Plaintiff on his negligence allegations). The underlying SAC alleged causes of action against VPI for breach of fiduciary duty, violation of several sections of the Corporations Code, declaratory relief about his membership status, (and also professional negligence against Griffiths; however, that negligence theory may also be alleged against VPI, but this is unclear). (Corp. Code, §§ 7710, 7411, 7412, 8813 [prohibiting false corporate financial reports, etc.].) In general, the breach of fiduciary duty and negligence causes of action

³ Both Larocque and Semelsberger were dismissed as defendants in the underlying actions and no timely appeal was taken; there are no separate issues in this appeal regarding Anderson's allegations against them.

challenged the decisions by VPI to suspend his membership, and to ignore his warnings about its tax and management policies. Plaintiff also alleged various violations of his rental agreement, which contained an attorney fees clause, and he sought damages according to proof and attorney fees.

All Defendants demurred to the underlying SAC. In September 2005, Judge Anello heard the demurrers and issued a detailed order (which is still being referred to by Plaintiff as support for his claims of legal malpractice). Regarding the claim for breach of fiduciary duty by VPI, Judge Anello sustained VPI's demurrer but allowed Plaintiff leave to amend, to more fully allege some kind of knowing misconduct by the VPI defendants that amounted to more than negligence, for purposes of applying the appropriate statutes of limitations. The remaining Corporations Code statutory causes of action were demurred out on limitations grounds. No demurrer was brought to the declaratory relief request. The request for punitive damages was stricken with leave to amend.

After this ruling was issued in the underlying action, these Defendants began to prepare a third amended complaint, and billed Plaintiff for those services. However, they then told Plaintiff that they did not believe the breach of fiduciary claim or punitive damages request could be successfully amended (for reasons to be explained in the discussion portion of this opinion). After some dispute and delay, in January 2006, Defendants wrote Plaintiff a letter stating that he had requested that they be relieved as counsel, and telling him to come in to pick up his file, to continue the case on his own or with another attorney. Plaintiff substituted in to represent himself in February 2006. The

upshot of all this was that no third amended complaint was ever filed to change the fiduciary duty allegations, and the only surviving claim in the main underlying action's SAC was the declaratory relief cause of action against VPI (regarding Plaintiff's membership status).

A few months later, Anderson obtained a replacement attorney (Mehrshad Mirkhan), who brought a reconsideration motion in April 2006, regarding the demurrer rulings. In the alternative, he requested that the court enter a voluntary dismissal of the sole remaining declaratory relief cause of action, without prejudice. Judge Anello granted the voluntary dismissal without prejudice in April 2006.

B. Successor Underlying Action (Prior Opinion)

Following that dismissal of the main underlying action, Plaintiff filed a new action in September 2006 (successor action) to update the status of his dispute with VPI, and he then amended it twice. In our prior opinion, his successor allegations in that action are well summarized. (Here, we need only note that the successor causes of actions [negligence, violation of civil rights and contract-based claims] were mainly differently labeled from those of the original underlying action, although many of the underlying factual allegations against VPI were identical.) VPI again demurred to the pleading, raising the bar of the statute of limitations as to the civil rights and other claims.

Ultimately, in December 2008, this court upheld the demurrer rulings that dismissed all of those successor causes of action (mainly as time barred), with the exception that upon remand, Plaintiff was allowed leave to amend his negligence allegations against VPI, for a certain time frame that theoretically would not be barred by

the statute of limitations (i.e., to allege negligent financial conduct by VPI that took place no earlier than two years before the successor action was filed in 2006, i.e., from Sept. 5, 2004 forward). The record does not show the status of that successor action. For our purposes, it is important only to note that this successor action does not serve to continue or replace the underlying action's allegations against VPI, since only the more recent allegations in the successor action eventually withstood demurrer (i.e., allegations of VPI negligence that postdate September 2004). The current action asserts these defendants committed legal malpractice, based on their failure to amend the underlying action's SAC to further pursue the earlier fiduciary duty claims against VPI.

C. Current Action; Demurrers and Rulings

This legal malpractice complaint was filed by Plaintiff, in propria persona, in February 2007 and amended in March 2007. He alleged that Defendants' malpractice caused him to lose recovery on certain claims in the main underlying action's SAC. His first amended complaint (FAC) alleged four causes of action against Defendants, grounded in negligence: (1) failure to plead civil rights violations by VPI in the underlying action, related to the allegedly unlawful cease and desist order (Civ. Code, § 52.1);⁴ (2) failure to plead attorney's fees as compensatory damages arising from VPI's

⁴ Civil Code section 52.1 provides in relevant part: "(b) Any individual whose exercise or enjoyment of rights secured by the Constitution or laws of the United States, or of rights secured by the Constitution or laws of this state, has been interfered with, or attempted to be interfered with . . . may institute and prosecute in his or her own name and on his or her own behalf a civil action for damages, including, but not limited to, damages under Section 52, injunctive relief, and other appropriate equitable relief to protect the peaceable exercise or enjoyment of the right or rights secured."

tortious conduct; (3) abandonment of the underlying case after the demurrers were sustained with leave to amend, possibly due in part to confusion when Attorney Jew departed the law firm's employment; and (4) Defendants' procedural errors in failing adequately to pursue discovery motions or reconsideration motions,

Defendants demurred to the malpractice FAC. Judge Stern issued a detailed ruling, sustaining demurrers without leave to amend on three of the four causes of action (nos. 1, 2, 4), for failure to state sufficient facts to support the claims. The court reasoned that a civil rights claim stemming out of the March 2001 cease and desist order, as pled, was barred by the applicable two-year limitations period of Civil Code section 52.1, and there was no showing of a possibility to amend. Regarding the attorney fees cause of action, the court noted that the underlying SAC actually did seek both damages and attorney fees, but that in any case, no facts were alleged to support application of the doctrine of "tort of another." (The FAC does not clearly plead or rely on any breach of the VPI residential agreement.) Also as to the fourth cause of action, the demurrer was sustained without leave to amend because Plaintiff could not allege facts showing the alleged procedural errors resulted in the dismissal of his underlying causes of action, since the claims were otherwise defective and/or voluntarily dismissed.

However, as to the "abandonment" claim, leave to amend was granted, to more clearly plead facts showing how it was that Defendants who allegedly lost the case, since it was Plaintiff's replacement attorney who voluntarily dismissed the case on its remaining causes of action (declaratory relief and negligence).

Plaintiff, in propria persona, filed his current SAC, first alleging that Defendants were negligent in pursuing the underlying action's SAC, by filing it in an untimely manner, or by failing to object to an untimely demurrer filing, or by failing to pursue discovery adequately, or by failing to plead claims of fraudulent concealment against VPI. Next, Plaintiff claimed that Defendants had abandoned the case by failing to file the amendment in the manner that Judge Anello had allowed (e.g., pleading vicarious liability theories or alternative attorney fees entitlement under a common fund theory or punitive damages for any intentional bad acts), so that Plaintiff had "no choice" but to allow the case to be dismissed by his replacement attorney.

Defendants demurred to the current SAC for failure to state a cause of action. This time, the court (Judge Stern) overruled the demurrer, stating that Plaintiff has adequately pled that these Defendants did not attempt to amend the underlying SAC regarding breach of fiduciary duty, even though they could have pled that something more than negligence was involved on the part of VPI and its representatives (as earlier suggested by Judge Anello). Accordingly, Defendants had not shown that, as a matter of law, they could not have amended the fiduciary duty claim to cure other defects, nor did the court file reflect that the fiduciary claim was properly dismissed, either independently or in connection with the declaratory relief voluntary dismissal in April 2006. The court further noted that even though the declaratory relief request (regarding Plaintiff's membership status) was voluntarily dismissed by replacement counsel, that did not remove any possibility that these Defendants' purported abandonment might have caused

a loss of Plaintiff's right to seek monetary damages against them, for his loss of the fiduciary duty claims.

This left the current SAC in place on the abandonment claim.

D. Summary Judgment Motion, Opposition

Defendants moved for summary judgment, or in the alternative, summary adjudication, based on arguments that as a matter of law, Plaintiff was unable to show they had any liability for professional negligence. First, Defendants argued that no malpractice liability could be premised on the disposition of the underlying SAC, insofar as it pled Corporations Code statutory claims, declaratory relief, or negligence, because Plaintiff had not sought to pursue them and had in fact voluntarily dismissed the declaratory relief remaining claim.

With respect to the underlying breach of fiduciary duty claim, Defendants argued that they had acted properly by not filing a third amended complaint, because it would have been time-barred and unmeritorious, based on Plaintiff's own deposition testimony that he had no knowledge of intentional acts committed by VPI officials against his interests.

Defendants presented evidence that they were threatened by VPI's counsel in the underlying action with a malicious prosecution action, if they pursued the breach of fiduciary duty theory. Defendants' investigation suggested that Plaintiff's theories were unfounded. Plaintiff has no formal training in accounting, tax preparation, paralegal studies, nor has he attended law school. Finally, Defendants argued that even if a breach of duty might have existed when they failed to amend the underlying SAC, there was no

causation of harm, because the underlying fiduciary duty claim was not viable as a matter of law, through no fault of Defendants.

In support of their motion, Defendants lodged numerous documents filed in the underlying action, and sought judicial notice of them. They also lodged declarations by the Defendant attorneys and an expert witness who addressed the business judgment rule applicable to corporations such as VPI (Attorney Rodney Donohoo). Attorney Donohoo gave the opinion that it was appropriate for VPI to rely on advice of its experts, including attorneys and accountants, in deciding how to structure its finances and pay its taxes. Accordingly, Attorney Donohoo stated that in his opinion, Defendants were not negligent in failing to pursue the breach of fiduciary claim against VPI, because it was not substantiated by the facts, and therefore malicious prosecution liability might have arisen on their parts and Plaintiff's.

In opposition, Plaintiff lodged documentation from the underlying litigation, seeking judicial notice of it, and argued that triable issues of fact remained on whether the legal representation provided by Attorney Jew in the underlying litigation met applicable standards of care, since he had admittedly failed to amend the SAC after the demurrer. Plaintiff argued that he had a meritorious underlying case, based on his own in propria persona tax analysis, and that VPI had breached its fiduciary duties toward him from 2000 through 2005. Plaintiff argued he was entitled to recover attorney fees based on the wrongful suspension of his membership by VPI, but that Attorney Jew had failed to file a civil rights claim in a timely manner.

In his lodged documents, Plaintiff included a March 2003 letter to him from a legislative consultant advising him to consult an attorney about the legal status of his resident owned park, and whether it was a stock cooperative or a common interest development. Plaintiff also relied on letters between himself and Attorney Jew about the preparation and billing for the proposed third amended complaint. Plaintiff supplied a transcript of the VPI hearing in which his membership was suspended, and other VPI financial records. The record has been augmented to include those documents.

In reply, Defendants argued that Plaintiff had failed to supply any admissible evidence to support his contentions that he had a meritorious claim that was lost, and he had not supplied any authenticated documents or expert opinion to controvert the extensive showing that Defendants had made. Plaintiff requested permission to present oral evidence at the hearing, and outlined his legal arguments. (Cal. Rules of Court, rule 3.1306; all further rule references are to the California Rules of Court, unless otherwise noted.) This was denied because Plaintiff did not explain about the evidence he proposed to present.

E. Ruling; New Trial and Sanctions Motions

Following oral argument, the court confirmed its tentative decision, which was to grant the motion. The summary judgment ruling issued June 11, 2008, first addressed both sides' evidentiary objections in detail. (Most of those rulings are not specifically challenged in this appeal and need not be discussed in detail, except as noted in part IIA, *post.*) The court granted Defendants' requests for judicial notice about the extensive documentary record in the underlying action. (Evid. Code, § 452, subd. (d).) It sustained

objections to Plaintiff's lodged exhibits, for lack of foundation and authenticity. The court expressly based its decision on the declarations provided by Larocque, the law firm's attorneys Jew and Hamilton, Attorney Thomas A. Scutti (VPI's attorney in the underlying action), and Defendants' expert witness, Attorney Donohoo, who discussed the business judgment rule and its protections for community association boards and their officers. (See *Lambden v. La Jolla Shores Clubdominium Homeowners Assn.* (1999) 21 Cal.4th 249.) The court also referred to enumerated lodged exhibits, including letters between Plaintiff and his various attorneys, Plaintiff's deposition testimony, Plaintiff's responses to requests for admissions, and Defendants' letter to Plaintiff in January 2006, requesting him to pick up his file as Plaintiff said he did not want to continue the professional relationship. Summary judgment was granted to Defendants, and costs awarded in the amount of \$1,773.

Next, Plaintiff filed a motion for reconsideration and new trial, arguing that Plaintiff should have been allowed to present oral testimony at the summary judgment hearing and the declarations provided by Defendants had included statements without evidentiary support. (Code of Civ. Proc., §§ 657, 1008.) Plaintiff also brought a motion for sanctions under Code of Civil Procedure section 128.7, on the ground that Defendants had filed declarations by their expert witness and themselves that were irregular, false, and misleading, and Defendants' settlement conference statement was the same. Plaintiff believed that the documents that he had previously lodged controverted the statements by Defendants in their declarations that Plaintiff had no remaining case against VPI for breach of fiduciary duty.

Defendants opposed all those motions, arguing that they sought to relitigate matters decided in the summary judgment proceedings and they were unsupported by facts, evidence, or declarations.

After oral argument, the trial court denied Plaintiff's new trial motion, with this explanation. Plaintiff's request to present oral testimony did not comply with the requirements of rule 3.1306 in that it did not reference any *oral* testimony to be introduced. Instead, Plaintiff had requested permission to introduce two declarations and a request for judicial notice of an exhibit. The court ruled, "This was not 'oral testimony' under [rule] 3.1306(b). In addition, a party ordinarily cannot present oral testimony at the hearing on a motion for new trial. [Citation.]"

With respect to Plaintiff's motion for sanctions under Code of Civil Procedure section 128.7, the trial court ruled that he had not met his burden of showing that the statements made in Defendants' settlement conference brief, or in Attorney Donohoo's expert declaration, met statutory standards, as " 'not warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law' or that 'the allegations and other factual contentions' in those documents have no evidentiary support or, are not 'likely to have evidentiary support after a reasonable opportunity for further investigation or discovery,' or that 'the denials of factual contentions' made in those documents are not 'warranted on the evidence' or are not 'reasonably based on a lack of information or belief.' " Thus, no sanctions were awarded.

Plaintiff appeals the judgment and related orders.

DISCUSSION

We first analyze the challenges to the ruling on the demurrers, to ascertain the proper scope of the pleading on which summary judgment was sought by Defendants. We then examine whether the trial court correctly found Defendants were entitled to judgment as a matter of law, on the legal malpractice allegations. Finally, we address Plaintiff's sanctions arguments on appeal. We set forth the applicable standards of review in connection with each discussion.

I

DEMURRER RULINGS

A. Introduction

Plaintiff attacks the trial court's rulings on the demurrers, which disposed of certain causes of action in his FAC regarding Defendants' alleged professional negligence. Specifically, Plaintiff argues Defendants failed, in the underlying action, to adequately plead certain claimed violations of his civil rights, attorney fees entitlements (contract or tort of another), or procedural error theories of damage to him. He also continued to pursue those arguments in his reconsideration motions, which the trial court denied, on the basis Plaintiff had not shown any new facts that could not have been produced earlier. (Code Civ. Proc., § 1008.)

For purposes of analyzing the demurrer rulings, a court will accept as true the facts alleged in the complaint. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) We give the pleading a reasonable interpretation, reading it as a whole, its parts in their context, to determine whether sufficient facts are stated to constitute a cause of action or a right to

the relief requested. (*Ibid.*) We review the legal sufficiency of the judgment, and not the reasoning of the trial court. (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 19.)

Further, "[i]f the court sustained the demurrer without leave to amend, as here, we must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment. [Citation.] If we find that an amendment could cure the defect, we conclude that the trial court abused its discretion and we reverse; if not, no abuse of discretion has occurred. [Citation.] The plaintiff has the burden of proving that an amendment would cure the defect. [Citation.]" (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)

In addressing these challenges to the pleadings regarding the first, second and fourth causes of action, we are mindful that the trial court ultimately overruled a further demurrer to Plaintiff's abandonment cause of action (no. 3). As a practical matter, we think that most of the allegations in the causes of action that were dismissed on demurrer are essentially subsumed and reiterated in the abandonment cause of action, which survived until the summary judgment stage. Specifically, the abandonment claim includes allegations that these Defendants did not properly pursue both pleadings and discovery matters in the underlying action. This was Plaintiff's effort to more clearly plead facts showing how it was these Defendants who allegedly abandoned the case, in light of the voluntary dismissal of the underlying action by Plaintiff's replacement attorney (remaining causes of action about declaratory relief and negligence).

Nevertheless, in an abundance of caution, we will address Plaintiff's current arguments about the demurrers, to determine if the trial court should have granted additional leave to amend on those specific theories, or if failure to do so was an abuse of discretion. Those earlier theories appear to be variations of Plaintiff's main theory earlier pursued against VPI, that it breached fiduciary duties owed to him, in connection with the cease and desist order and the suspension of his membership, because it did not accept his recommendations on tax matters. Plaintiff would like to show that he would have been successful on those alternative theories against VPI, and that accordingly, these Defendants as his attorneys lost his potential recovery in damages. (Civ. Code, § 52.1.) Some analysis is therefore required on whether these alternative theories would have been viable against VPI, in this legal malpractice context. (See *Hecht Solberg et al. v. Superior Court* (2006) 137 Cal.App.4th 579, 591(*Hecht, Solberg*) ["The plaintiff has to show both that the loss of a valid claim was proximately caused by defendant attorney's negligence, and that such a loss was measurable in damages."].)

However, to the extent that Plaintiff appears to be seeking to have this court revive his Corporations Code theories in the underlying action, on the theory that de novo review under the terms of Code of Civil Procedure section 906 ("Powers of Reviewing Court") would allow such wide-ranging relief, we reject his request. Those statutory issues are not properly presented in this proceeding and we decline to discuss them. We also note that Plaintiff's oral argument letter attempts to bring issues before us concerning the California Rules of Professional Conduct, rule 3-110 (failure to act competently). This court is not the proper forum for such arguments in this case.

B. Civil Code Section 52.1

In our prior opinion arising out of the trial court's resolution of the successor underlying action, we set forth rules for analyzing a cause of action for violation of Civil Code section 52.1. Such a claim is properly subject to the two-year limitations period for personal injury claims set forth in Code of Civil Procedure section 335.1. For that proposition, we relied on *West Shield Investigations and Security Consultants v. Superior Court* (2000) 82 Cal.App.4th 935, 953 (the statute of limitations for personal injury actions — which at that time was one year, but is now two years — applied to Civ. Code, § 52.1); *Gatto v. County of Sonoma* (2002) 98 Cal.App.4th 744, 760 (claim under Civ. Code, § 52.1 alleging violation of the right to free speech was subject to the limitations period for personal injuries.)

To decide whether the two-year statute of limitations barred that cause of action, we apply the rule that "statutes of limitation do not begin to run until a cause of action accrues. [Citation.] [¶] Generally speaking, a cause of action accrues at 'the time when the cause of action is complete with all of its elements.'" (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 806 (*Fox*).

In Judge Stern's ruling sustaining the demurrers without leave to amend on this cause of action, she reasoned that a civil rights claim stemming out of the March 2001 cease and desist order, as pled, was barred by the applicable two-year limitations period of Civil Code section 52.1, and there was no showing of a possibility to amend. However, Plaintiff also included allegations that his civil rights were again violated in October 2002 when the suspension order was imposed by VPI. At least theoretically,

Plaintiff could assert that this more recent conduct violated his civil rights in some undetermined manner, although the exact connection with civil rights statutes remains unclear. Nevertheless, when Judge Anello sustained VPI's demurrer to the underlying SAC, he allowed Plaintiff leave to amend to allege some kind of knowing misconduct by Defendants that amounted to more than negligence, i.e., breach of fiduciary duty in some manner.

We therefore emphasize that Plaintiff's current theory of how he lost a meritorious claim against VPI, due to these Defendants' failure to fully plead civil rights violations by VPI in the underlying action, must be viewed in light of his main contention that these Defendants did so in connection with negligently abandoning his breach of fiduciary claim. On appeal, he adds allegations that VPI continued to breach his civil rights by reimposing a suspension of his membership in September 2003. He argues that the October 2003 filing of the underlying action must be considered timely as to those civil rights based theories, which have a two-year statute of limitations. (Code Civ. Proc., § 335.1.)

Even assuming that it could somehow have been pled that the October 2002 conduct by VPI was the operative date that any such civil rights claim accrued, it is still unclear whether Plaintiff's allegations in the FAC (e.g., VPI's infringements of his right to (1) free speech, (2) to petition the government for redress of grievances or (3) to vote on VPI issues) gave rise to any kind of claims that are independent of his fiduciary duty theories against VPI, and whether they are somehow independent of the "abandonment" cause of action that survived past the demurrer stage.

We think that in light of the difficult and challenging nature of analyzing Plaintiff's pleadings, and because he never made clear the scope of or legal authorization for any proposed amendments, we cannot fault the trial court for sustaining the demurrers to this particular variation of his basic claims against VPI. For example, the trial court did not have to do independent research to determine the proper parameters of a civil rights claim under Civil Code section 52.1. Nor did plaintiff present new or different facts at the reconsideration stage, to justify a different ruling. (See *McPherson v. City of Manhattan Beach* (2000) 78 Cal.App.4th 1252, 1265.)

On this record, where the abandonment claim survived the pleading stage (essentially to vindicate the underlying fiduciary breach allegations), we cannot say it was an abuse of discretion for the trial court to deny leave to amend in this respect. Instead, on de novo review, we may appropriately consider the many different aspects of the general fiduciary duty claims against VPI, as they appear within the scope of the abandonment cause of action, because all those issues were effectively litigated in the summary judgment proceedings.

C. Remaining Causes of Action in the FAC

In our prior opinion, this court upheld the demurrer rulings that dismissed all of the successor causes of action, except for allowing amendment to the negligence allegations for a certain time frame (from Sept. 5, 2004 forward). Thus, Plaintiff's successor breach of contract claims based upon his residential agreement were dismissed. However, in this appeal in the malpractice action, he is arguing that Defendants should have pled an attorney fees entitlement under the attorney fees clause of the residential

agreement. This appears to be a new argument on appeal, because his underlying SAC pled attorney's fees as compensatory damages only under a "tort of another" theory. (*Prentice v. North American Title Guaranty Corp.* (1963) 59 Cal.2d 618, 620; *Orrick Herrington & Sutcliffe v. Superior Court* (2003) 107 Cal.App.4th 1052, 1061, fn. 5 (*Orrick*) [fees paid to a second attorney to correct the first attorney's error may sometimes be characterized as tort damages, on a "tort of another" theory].)

In any case, in the trial court's ruling on the current FAC attorney fees cause of action, it noted that the underlying SAC actually did seek both damages and attorney fees, but that no facts were sufficiently alleged to support a current application of the doctrine of "tort of another." (There is also no clear reliance upon an attorney fees clause of the residential agreement.) As to the fourth cause of action, the demurrer was sustained without leave to amend because Plaintiff could not allege facts showing how the alleged "procedural errors" directly resulted in the dismissal of his causes of action, since the claims were otherwise defective and/or voluntarily dismissed.

None of these rulings on the pleadings represent an abuse of discretion. In this appeal, it would serve no purpose for us to debate, as a matter of pleading analysis, whether Plaintiff lost a particular kind of meritorious claim against VPI for attorney fees on either a tort or contract basis. Rather, we will treat the current SAC's abandonment claim that survived past the demurrer stage as generally encompassing all the various incarnations of Plaintiff's grievances toward VPI, all within the context of the fiduciary duty claim that was not successfully amended by Defendants. The same approach is necessary for the cause of action entitled "procedural errors," in which Plaintiff contends

these Defendants botched his underlying case by making procedural errors (failing adequately to pursue discovery motions or reconsideration motions concerning pleadings).

We accordingly turn to the summary judgment issues, because, in view of the history of the case and the familiarity of the trial court with the procedural sequence that was followed, we believe it is more productive and promotive of judicial economy to deem that all the abandonment issues, broadly construed, were placed before the trial court at the summary judgment stage of the proceedings. It was not an abuse of discretion for the trial court to narrow the scope of the pleadings at the demurrer stage, in light of all the circumstances and the manner in which Plaintiff has inartfully, but thoroughly, presented his numerous theories. (*Schifando, supra*, 31 Cal.4th 1074, 1081.)

II

GRANT OF SUMMARY JUDGMENT; DENIAL OF NEW TRIAL

To prevail in a motion for summary judgment, a defendant must bear a burden of persuasion "that 'one or more elements of' the 'cause of action' in question 'cannot be established,' or that 'there is a complete defense' thereto. [Citation.] [¶] . . . [T]he party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact. . . . A prima facie showing is one that is sufficient to

support the position of the party in question. [Citation.]" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850-851.)

On review of the order granting summary judgment, the appellate court follows the same procedure as did the trial court: "We identify the issues framed by the pleadings, determine whether the moving party has negated the nonmoving party's claims, and determine whether the opposition has demonstrated the existence of a triable issue of material fact. [Citation.]" (*Orrick, supra*, 107 Cal.App.4th 1052, 1056-1057.) Summary judgment is proper if no triable issue of fact is shown by all the papers submitted, such that the moving party is entitled to judgment as a matter of law. (*Ibid.*)

A. Evidentiary Issues

On appeal of summary judgment, " 'we review the record de novo, considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained. [Citations.]' [Citations.]" (*Smith v. Wells Fargo Bank, N.A.* (2005) 135 Cal.App.4th 1463, 1472, citing *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.) To the extent that evidentiary rulings are actually being argued in the briefs, we apply an abuse of discretion standard of review. In *Carnes v. Superior Court* (2005) 126 Cal.App.4th 688, 694, the appellate court noted that even though ordinarily, an appellate court reviews a summary judgment motion "de novo," a different analysis will apply for review of a trial court's rulings on evidentiary objections. Thus, "an appellate court reviews a court's final rulings on evidentiary objections by applying an abuse of discretion standard. [Citations.]" (*Ibid.*) Even where an appellant disagrees with the rulings made, reversal is not required if they are not shown to be

incorrect. " 'Anyone who seeks on appeal to predicate a reversal of [a judgment] on error must show that it was prejudicial. [Citation.]" [Citation.]" (*Ibid.*)

On this point, we note that the trial court issued extensive evidentiary rulings on objections brought by each party to the other's materials presented in the motion proceedings. In the summary judgment order, the trial court sustained objections by Defendants (lack of foundation and lack of authenticity) to Plaintiff's exhibits. Those are the same lodged documents included in the record by augmentation, as material lodged by Plaintiff in support of his opposition to the summary judgment motion (including Attorney Jew's billing statements and letter agreeing to produce a third amended complaint, exhibits to Plaintiff's deposition, and other materials, most of which are duplicated elsewhere in the record). It is not disputed that the trial court had most of these documents before it in other submissions.

Plaintiff's main evidentiary argument appears to be that the trial court should have allowed him to present oral testimony to authenticate his lodged exhibits, which did not otherwise have a declaration authenticating them. Otherwise, Plaintiff merely continues to argue his interpretation of the evidence, with respect to the sufficiency of Defendants' activities in pursuing or not pursuing his underlying action, and also the meaning of the activities of the replacement attorney that he hired (Mr. Mirkhan, who dismissed the declaratory relief claim without prejudice). Defendants have consistently argued that their own showing of entitlement to this summary judgment was sufficient, and was not successfully controverted by Plaintiff's showing.

Because these arguments on appeal address grounds for the summary judgment order, it is necessary to set forth the evidentiary rulings the trial court made in the order, and later in the new trial order. (That is, in the order on the new trial motion, the trial court expanded on its original evidentiary rulings, in part because plaintiff objected that other rulings were insufficiently specific; see *Demps v. San Francisco Housing Authority* (2007) 149 Cal.App.4th 564, 575 [a trial court's failure to rule on the moving party's evidentiary objections, before ruling on the moving party's summary judgment motion in the plaintiff's action, resulted in objections being deemed waived, such that evidence became part of appellate record].) Here, we quote from the court's evidentiary ruling in the summary judgment proceeding, to show its reasoning process:

As relevant here, "the court will not consider Plaintiff's objections to the declarations of Mickey Jew and Rodney Donohoo. Instead of citing to any portion of the Evidence Code, which would render the statements in these declarations inadmissible, in his 'objections' Plaintiff argues with the statements by these declarants. Factual and/or legal arguments cannot form the basis of evidentiary objections to the moving party's evidence. It is clear to the court that Plaintiff intended these documents to be construed as evidentiary objections to Defendants' evidence, as he has complied with the formatting requirements for evidentiary objections set out in rule 3.1354(b). However, as indicated above, they are substantively insufficient. [¶] The court also declines to rule on Defendants' objections to Plaintiff's objections to the declarations of Mickey Jew and Rodney Donohoo. Evidentiary objections are not themselves evidence to which opposing evidentiary objections can be proffered. It is clear from the title of the documents

objected to by Defendants and the format of those objections that Plaintiff did not intend for them to constitute evidence. This is true despite the fact Plaintiff put his objections to the Donohoo declaration under penalty of perjury. Even if the 'objections' to the Donohoo declaration could be construed as evidence, Plaintiff did not sign the objections. Thus, that 'objection' is not admissible evidence. Because Plaintiff's objections are not evidence, the court will not consider objections to them."

The trial court then proceeded to sustain Defendants' objections to Plaintiff's lodged exhibits, and to deny Plaintiff's request to present oral evidence at the hearing. (Rule 3.1306.)⁵ That request set forth seven pages of argument about why Defendants were never really exposed to a malicious prosecution threat from VPI, in Plaintiff's opinion, and why he believed that no expert testimony was necessary, because these issues were so obvious that a trier of fact could have found obvious professional negligence without the need of expert assistance. (See *Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1093.) Plaintiff also presented argument about why the court should disregard Attorney Donohoo's expert declaration about whether legal malpractice could be proved against Defendants, apparently on the theory that Plaintiff interpreted the relevant law differently. However, Plaintiff did not outline the oral testimony he wished to provide.

⁵ Rule 3.1306(a) sets restrictions on oral testimony at law and motion hearings, "unless the court orders otherwise for good cause shown." Under subdivision (b), in a request to present oral testimony, the party "must file, no later than three court days before the hearing, a written statement stating the nature and extent of the evidence proposed to be introduced and a reasonable time estimate for the hearing."

Under rule 3.1306, the trial court had the discretion to deny this request to present oral testimony, because Plaintiff did not set forth the oral testimony he was qualified to provide at the hearing on the motion. The authority that Plaintiff relies on, *Brannon v. Superior Court* (2004) 114 Cal.App.4th 1203, applies to the right to present oral argument, not oral testimony. That holding is, "the superior court erred in refusing to provide the parties an opportunity to appear and present argument at an oral hearing before the court ruled on the defendants' summary judgment motion." (*Id.* at p. 1205.) This record contains reporter's transcripts from the summary judgment and sanctions motions, showing that Plaintiff had his days in court. There was no good cause shown to present oral testimony. (Rule 3.1306(a).)

On the whole, it is evident that the detailed summary judgment evidentiary rulings represented appropriate exercises of the trial court's discretion in objectively analyzing the respective showings made, and in evaluating the proof problems presented by Plaintiff's opposing papers and lodgment.

Later, in the new trial ruling, the court exhaustively addressed Defendants' evidentiary objections brought to Plaintiff's new trial declaration. Plaintiff was contending that Defendants were wrong in their percipient and expert witness declarations that asserted the application of the business judgment rule to VPI activities, for the purposes of evaluating Defendants' professional decisions made during their representation of Plaintiff. Plaintiff continues to argue that Defendants should have pursued VPI more strenuously in the underlying action, so that the grant of summary judgment to them must be incorrect. Some defense objections to his new trial declaration

were sustained for improper expert opinion, improper legal conclusion, lack of foundation, relevancy, argumentative, and speculation. Other objections were overruled, and the motion for new trial was denied.

The parties do not specifically brief those objections and rulings at the new trial proceeding, and it is not necessary to address them here, as the same basic issues are presented in the summary judgment arguments as a whole. In other words, the central task presented on this record is to outline the elements of the legal malpractice claim, to determine whether triable material issues of fact are demonstrated on this record, regarding the validity of the actions or inactions taken by Defendants in the underlying action.

B. Legal Malpractice Standards and Defendants' Showing

To recover against Defendants, Plaintiff must prove each of the elements of his cause of action for professional negligence: "(1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional's negligence." (*Budd v. Nixen* (1971) 6 Cal.3d 195, 200; *Adams v. Paul* (1995) 11 Cal.4th 583, 588-590.)

Although a plaintiff alleging legal malpractice is not required to offer proof that establishes causation "with absolute certainty," the plaintiff must " 'introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result.' " [Citations.] In any event,

difficulties of proof cannot justify imposing liability for injuries that the attorney could not have prevented by performing according to the required standard of care. [Citation.]" (*Viner v. Sweet* (2003) 30 Cal.4th 1232, 1242-1243 (*Viner*).) "In the legal malpractice context, the elements of causation and damage are particularly closely linked. . . . The plaintiff has to show both that the loss of a valid claim was proximately caused by defendant attorney's negligence, and that such a loss was measurable in damages." (*Hecht Solberg, supra*, 137 Cal.App.4th 579, 591.)

Here, Plaintiff is alleging negligence as to the litigation of the underlying case, with respect to the pursuit of pleadings, motions, discovery, and reconsideration. He is required to "establish that *but for* the alleged negligence of the defendant attorney, the plaintiff would have obtained a more favorable judgment or settlement in the action in which the malpractice allegedly occurred. The purpose of this requirement, which has been in use for more than 120 years, is to safeguard against speculative and conjectural claims. [Citation.] It serves the essential purpose of ensuring that damages awarded for the attorney's malpractice actually have been caused by the malpractice." (*Viner, supra*, 30 Cal.4th 1232, 1241.)

At the hearing on the motion, all these elements of malpractice were hotly disputed. However, in the summary judgment papers, Defendants presented as their backup position that, even if it is assumed that there may be triable issues regarding duty and breach in the subject legal representation, the remaining negligence issues concerning causation and damage are dispositive in Defendants' favor. (*Campbell v. Magana* (1960) 184 Cal.App.2d 751, 754.) We think that the most efficient form of analysis is for us to

assume, for the sake of argument, that due to the evidence of the breakdown in the attorney-client relationship between Defendants and Plaintiff, there was at the very least some confusion about transferring the file and the burden of going forward in amending the pleading in the manner allowed by Judge Anello's 2005 ruling. The attorney-client relationship formally ended in February 2006, and the period for amending the pleadings, with a stipulated extension, had apparently expired in October 2005. Only for purposes of analysis, we will assume that Plaintiff may be able to show triable issues regarding Defendants' duty and breach in transferring the file, and we will next turn to the remaining elements of causation and damage, to analyze whether summary judgment was incorrectly granted on the merits of the case. We are required to consider the causation and damages issues on a de novo basis. (*Orrick, supra*, 107 Cal.App.4th 1052, 1056-1057.)

In Defendants' summary judgment motion papers, they presented supporting evidence on their position that, as a matter of law, Plaintiff was unable to show their activities caused any harm to the viability of his underlying case. First, they argued that no malpractice liability could be premised on the underlying SAC, insofar as it pled Corporations Code statutory claims, declaratory relief or negligence, since Plaintiff had not sought to pursue them and had in fact voluntarily dismissed the declaratory relief remaining claim.

Defendants' chief arguments were addressed to the breach of fiduciary duty underlying claim. They argued that they acted properly by not filing the third amended complaint that they had prepared, because on further reflection, they determined it would

have been time-barred and unmeritorious. In support, they cited to Plaintiff's own deposition testimony that he had no knowledge of intentional acts by the underlying defendants, VPI, against his interests. Further, Defendants argued that even if a breach of duty existed when they failed to file the amendments to the underlying SAC, there was no causation of harm, because no underlying fiduciary duty claim could have been stated as a matter of law, through no fault of Defendants.

In support of their motion, Defendants lodged numerous documents filed in the underlying action, and sought judicial notice of them. They also lodged declarations by Attorney Jew and others in the firm, stating that Plaintiff refused to accept their explanation that the breach of fiduciary duty claim did not have legal or factual support, in light of his deposition and the documentary evidence. Defendants supplied a declaration from Mr. Larocque, stating that his decisions were made for VPI on advice of counsel and tax professionals. Mr. Scutti (VPI's attorney in the underlying action), provided a declaration confirming that he discussed with Defendants the idea of sending the case to binding arbitration, but Plaintiff would not consent. He told Plaintiff and Attorney Jew at the time that if they continued to pursue the action, VPI would consider suing them for malicious prosecution if it prevailed.

Defendants' expert witness, Attorney Donohoo, discussed his review of the file and his conclusions that the VPI officers were entitled to rely on the business judgment rule to protect their good faith management decisions, and that the file indicated that they had acted on advice of counsel and tax professionals. Donohoo outlined the time frames of Plaintiff's efforts to bring his concerns to the VPI board, as shown by discovery, and

Donohoo reached a conclusion that many of Plaintiff's claims were time-barred. He believed that these Defendants had no option other than to withdraw as Plaintiff's attorney, because no good faith amendments to the fiduciary duty claim could have been made.

Defendants lodged additional exhibits with the court, including letters between Plaintiff and his various attorneys, Plaintiff's deposition testimony, Plaintiff's responses to requests for admissions, and Defendants' letter to Plaintiff in January 2006, requesting him to pick up his file, as they understood Plaintiff did not want to continue the professional relationship.

C. Opposition Showing; Application of Authority

In opposition to the summary judgment motion, Plaintiff lodged his exhibits that documented the underlying litigation, and used them to support his argument that triable issues of fact remained on whether the legal representation provided by Defendants in the underlying litigation met applicable standards of care. Plaintiff argued that Defendants' failure to amend the pleading after the demurrer doomed his underlying case against VPI, which he believed was meritorious in light of his own interpretations of the applicable tax regulations and law. Based on VPI's suspension of his membership, he states he should have had a viable civil rights claim and VPI had thereby breached its fiduciary duties toward him from at least 2002 through 2005, causing him damage, including attorney fees. He did not discuss Defendants' expert declaration nor present any of his own, nor any declarations.

In reply, Defendants argued that Plaintiff had failed to supply any admissible evidence to support his contentions that he had a meritorious claim that was lost, and he had not supplied any authenticated documents or expert opinion to controvert the showing that Defendants had made. (Plaintiff's request to present oral evidence at the hearing, was properly denied, as explained *ante.*) (Rule 3.1306.)

Many of Plaintiff's arguments about the merits of the underlying claims were presented again in his new trial or reconsideration motion, which the trial court denied. (Code Civ. Proc., § 1008.)

In light of this state of the record, we cannot accept Plaintiff's contentions that the trial court erroneously failed to recognize that triable issues of fact remained regarding causation of his losses from the alleged legal malpractice, i.e., any claimed damages that arose when VPI suspended his membership and placed a lien on it, nor the alleged breaches of fiduciary duties owing to him as a resident of the Park. The lodged documents on which Plaintiff relies, even if considered as having been brought before the trial court, do not establish as a matter of fact or law that Plaintiff would have been able to proceed more successfully against VPI, on any of his grievances against them. Instead, those documents are in the record through augmentation, and they show only that Defendants originally agreed to prepare a third amended complaint, but then sought to persuade Plaintiff that it was not well grounded in the facts that had been established through discovery, nor in applicable legal principles. The fact that Plaintiff continues to disagree with them does not establish as a matter of law that Defendants' professional decisions, made during the period that they represented him, were wrong and caused him

damage with respect to the underlying action's failure. Instead, Defendants have provided a logical explanation of why they were not justified in proceeding with Plaintiff's underlying case, for reasons of professional analysis and ethics, and that explanation is well founded in the discovery materials and the undisputed facts presented.

We observe that at various points in his reply brief, Plaintiff raises the issues of whether VPI's business structure should properly have been called a nonprofit association, a condominium management association, a homeowners association, a stock cooperative, a residential real estate management corporation, a taxable corporation, an acquisition corporation, or a common interest association. The very fact that Plaintiff's theories about the proper characterization of VPI's operations, for tax and other purposes, are so complicated suggests that expert opinion was properly accepted by the trial court as persuasive. In any case, Plaintiff never effectively challenged the qualifications of the expert witness.

In *Piscitelli v. Friedenber*g (2001) 87 Cal.App.4th 953, 972, this court outlined the proper parameters of expert opinion in a legal malpractice case. The Evidence Code provides that an expert's opinion testimony, if otherwise admissible, will not be objectionable where it embraces an ultimate issue to be decided by the trier of fact. (*Piscitelli, supra*, at p. 972; Evid. Code, § 805.) The expert may not, however, take over the function of the factfinder by resolving and directing the resolution of an ultimate issue in a case. (*Piscitelli, supra*, at pp. 972-974.)

We disagree with Plaintiff that this factual record could be evaluated as demonstrating professional malpractice that is obvious to a layperson, without the need of

expert assistance. (See *Stanley v. Richmond*, *supra*, 35 Cal.App.4th 1070, 1093.) There is no indication here that the trial court did not utilize the expert opinion properly, but rather, the court independently evaluated the issues and analyzed the merits of the underlying case within the case. The appropriate conclusion was that Plaintiff had not pointed to any triable issues of material fact about any likelihood of eventual success of his underlying action, even if timely pursued. The trial court properly granted summary judgment to Defendants, because they sufficiently showed that the failure of Plaintiff's underlying action was not caused by the manner of their professional representation of him. Defendants' professional judgments that the proposed amendments could not be successful were justified under the circumstances shown in the record. They explained to Plaintiff why they did not believe the breach of fiduciary claim could be successfully amended, and then facilitated his transfer of the file for successor representation.

This record also shows the trial court comprehensively analyzed the evidentiary issues in connection with the reconsideration and new trial motions, and was well aware of the underlying facts, as they had been demonstrated in the respective showings by the parties. The court reached correct conclusions and did not abuse its discretion nor prejudicially misapply the law in rendering its rulings.

III

SANCTIONS MOTION

Plaintiff next brought a motion for sanctions under Code of Civil Procedure section 128.7, on the ground that Defendants had filed declarations by their expert witness and by themselves that were irregular, false, and misleading, and Defendants'

settlement conference statement was likewise defective. We first take note that Plaintiff's briefs on appeal, while lengthy, do not directly address any issues about the settlement conference statement, and we may treat that issue as waived. "'This court is not required to discuss or consider points which are not argued or which are not supported by citation to authorities or the record.'" (*Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979.)

With respect to Plaintiff's motion for sanctions claiming the declarations of Attorney Donohoo or Defendants' attorneys contained false statements, Plaintiff has not shown on appeal how the trial court incorrectly analyzed those documents. Code of Civil Procedure section 128.7 required Plaintiff to demonstrate in his motion that "the allegations and other factual contentions" in the challenged documents had no evidentiary support, or were not "likely to have evidentiary support after a reasonable opportunity for further investigation or discovery," or that "the denials of factual contentions" made in those documents are not "warranted on the evidence" or are not "reasonably based on a lack of information or belief." (See Code Civ. Proc., § 128.7, subds. (a), (b)(2)-(4).)

Instead of making such a showing, Plaintiff again offered his own interpretation of the topics and legal questions addressed by the attorney-witnesses, such as the possibility of Defendants' exposure to a well founded malicious prosecution action, if the fiduciary duty claims against VPI had been pursued. Plaintiff also continues to interpret the business judgment rule and the rules governing taxation of homeowners' associations and stock cooperatives in his own way, differently from Defendants. He further points out that Mr. Donohoo shares office space with Defendants and claims he should not be considered to be an independent expert.

None of these arguments serves to demonstrate that the declarations provided by Defendants contained false allegations or factual contentions, or were otherwise forbidden by statute. We thus agree with the analysis by the trial court: "Instead of offering evidence to demonstrate the above requirements, Plaintiff's motion re-argues contentions made in prior motions which have been rejected by the court. In addition, Plaintiff's motion makes arguments as to the merits of the underlying and instant lawsuits without relating those arguments to the 2 documents mentioned in the points and authorities as demonstrating sanctionable conduct (i.e., the Special Settlement Conference Brief and Donohoo declaration). In addition, Plaintiff does not explain how those arguments support imposition of sanctions under Code of Civil Procedure section 128.7[, subdivision (b)](1)-(4). The mere fact Plaintiff disagrees with Defendants' statements of evidence is not sufficient to support imposition of sanctions under the code section relied on. As Plaintiff has not made the requisite showing, his request for imposition of sanctions is denied." No prejudicial reversible error has been demonstrated in this or in any other respect.

DISPOSITION

Summary judgment for Defendants and the postjudgment orders are affirmed.

Costs are awarded to respondents.

HUFFMAN, J.

WE CONCUR:

BENKE, Acting P. J.

NARES, J.